UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:08-cr-00330-T-30TBM

JOHN ROBERT MILLER

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REPLY TO DEFENDANT MILLER'S RESPONSE TO MOTION TO HAVE ADDITIONAL COAST BANK BORROWERS RECOGNIZED AS CRIME VICTIMS PURSUANT TO THE CRIME VICTIM'S RIGHTS ACT

Various borrowers who have suffered harms as the result of defendant Miller's crime have previously moved to be recognized as "crime victims" under the Crime Victims Rights Act. Defendant Miller has filed a response to the motion and the borrowers now file this reply.

Miller does not challenge the facts that borrowers have proffered in support of their motion. Of particular importance, Miller has not challenged that, as a result of the crime, Janis Stewart became responsible for an extra $3,330 on her loan and immediately began paying interest on that amount. In light of these admissions, Stewart – and the other similarly-situated borrowers – are all entitled to be recognized as "crime victims" under the Act.

With regard to the applicable law, Miller also fails to recognize the breadth of the definition of "crime victim" found in the Crime Victim's Rights Act. He cites, for example,

Eleventh Circuit case law that the Eleventh Circuit has expressly stated uses a narrower definition of "crime victim" than Congress employed here.

Accordingly, this Court should recognize Ms. Stewart and the other borrowers as crime victims. In the alternative, the Court should schedule an evidentiary hearing quickly to resolve these matters. The Court should schedule its hearing shortly after December 16, 2008, when the Court should have the benefit of the Eleventh Circuit's ruling on the mandamus petition filed by the borrowers seeking review of Judge Kovachevich's decision in the related criminal case, *United States v. Coon*, No. 8:08-CR-441.

MILLER HAS NOT CONTESTED FACTS PROVING THAT MS. STEWART AND THE OTHER BORROWERS WERE HARMED BY HIS CRIME.

In their motions, Ms. Stewart and the other borrowers have demonstrated that they were directly harmed as the result of Miller's crime. For example, Ms. Stewart demonstrated that she became liable for an extra $3330 on her loan and began paying interest on this extra amount immediately. Motion to Have Additional Coast Borrowers Recognized, Statement of Fact #7.

In response, Miller quibbles over terminology, stating that it is "inflammatory language" to call this "overcharging" and "criminally-inflating." But this is wordplay. His own plea agreement states directly that: "[O]n December 1, 2005, the defendant charged AML client Janis Stewart a mortgage brokerage fee amounting to two percent, rather than the standard one percent *that would otherwise have been charged by AML*, of the $333,000 loan made by Coast to enable Stewart to purchase real property and build a home in Rotonda West, Florida." Miller Plea Agreement, ¶ 9 (emphasis added). Thus, he has admitted "overcharging" Stewart – or, if he would prefer, he charged Stewart more than

"would otherwise have been charged." This is all that is required to prove, as a factual matter, that Ms. Stewart and the other borrowers were, as a matter of fact, financially harmed by his offense.

Miller also seems to be refusing to accept responsibility for all of the harmful effects of his crime. He begins by characterizing all of the borrowers as "investors," when in fact the borrowers include (among others) primary home purchasers. Moreover, he claims that the borrowers "had the option of funding the purchase of these homes using any means at their disposal." Miller Response at 1. In reality, until the end of 2005 when CCI started to bring its business elsewhere, customers were told that in order to do business with CCI they had to use AML and Coast Bank for their financing.[1]

Miller also remarkably claims that the extra points he charged "were in line with the market . . . ." Miller Response at 1. This is, obviously, at odds with his plea agreement, in which stated (under penalty of perjury) that he charged the borrowers "a mortgage brokerage fee amounting to two percent, rather than the *standard* one percent *that would otherwise have been charged by AML* . . . ." Miller Plea Agreement, ¶ 9 (emphases added). Miller further claims that the extra points were "fully disclosed to . . . the investors." Miller Response at 2. If so, perhaps he would be able to produce to the Court written mortgage brokerage agreements. Florida law requires such agreements. *See* Fla. Stat. Ann. § 494.0038. But the borrowers have not seen any such agreements executed by AML. Nor have any such agreements been provided by Miller or entered into the record

[1] If this fact is important, the borrowers request an evidentiary hearing, at which they could produce witnesses who would testify that they asked to finance their deals through other sources but were specifically told they could not by CCI and AML.

in this case.

Finally, Miller has the audacity to claim that his "kickback arrangement" had "nothing to do with any of the losses incurred by the [borrowers]." Miller Response at 2. But the builder – CCI – took the position in its bankruptcy action that its inability to complete the homes was the result of Coon and Miller skimming too much from the loans and refusing to pay CCI its final draw when homes were ready for certificate of occupancy. *See generally* Sworn Testimony of Jesse B. Battle, III, in *In re: Construction Compliance, Inc.,* No. 8:07-2650-CPM (U.S. Bankruptcy Court M.D. Fla.) (May 9, 2007).[2] Clearly skimming points off the loan, as Miller did, not only harmed the borrowers directly by interest payments and the like, but also created a greater risk of the homes never being built – as in fact ultimately occurred.

For all these reasons, the borrowers have proven, as a factual matter, that they suffered financial harm resulting from Miller's crime.[3]

MILLER'S CITED CASES ARE NOT APPLICABLE, AS THE ELEVENTH CIRCUIT HAS SPECIFICALLY HELD.

Miller also argues that, as a legal matter, the borrowers should not be recognized as "crime victims" because the offense of conviction did not harm them. As just explained, this is untrue as a factual matter, because one of the overt acts of the conspiracy that Miller pled guilty to was charging Ms. Stewart more than she would have otherwise been

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[2] The Court can take judicial notice of hearings in other court cases. Moreover, it bears emphasizing that Miller chose not to provide even a single citation or document supporting any of his asserted "facts."

[3] If the Court believes Miller's pleading somehow creates disputed facts on this issue sufficiently important to deprive the borrowers of their rights under the CVRA, then the borrowers respectfully request an evidentiary hearing to resolve those disputes.

charged. Miller Criminal Info. at ¶ 16(a) (alleging as "overt act" charging Ms. Miller two percent "rather than the standard one percent that would otherwise have been charged"). But as a legal matter, the argument is wrong as well.

Miller claims that his argument is "well illustrated" by *United States v. McArthur*, 108 F.3d 1350 (11th Cir. 1997), an old restitution case involving restitution under an early version of the Victim-Witness Protection Act. But the definition of "crime victim" has been considerably broadened since then. As the Eleventh Circuit recently explained, *McArthur* and other older cases involved a definition of "crime victim" that is "materially different from the [Mandatory Victim Restitution Act] . . . ." *United States v. Washington*, 434 F.3d 1265, 1269 (11th Cir. 2006). The Circuit thus concluded that cases like *United States v. McArthur*, 108 F.3d 1350 (11th Cir. 1997), have no relevance to interpreting a statute allowing restitution for all losses that "directly and proximately result from" an offense. 434 F.3d at 1269; *see also United States v. Foley*, 508 F.3d 627, 636 (11th Cir. 2007) (noting that cases like *McArthur* are irrelevant to interpreting the phrase "directly and proximately harmed," which defines "victim" "more broadly" than did earlier statutes).

The broad definition of "crime victim" that Congress used in the Mandatory Victim Restitution Act is the same broad definition Congress used in the CVRA. The broad definition does not require that a person prove they were listed among the elements of the crime in order to claim the protections of the CVRA. To the contrary, as the Eleventh Circuit has reminded, all that is necessary is that the person suffer harm that is "causally related" to the crime of conviction. *United States v. Washington*, 434 F.3d 1265, 1269 (11th Cir. 2006) (finding that condominium association was a "victim" of a bank robbery because

bank robbery damaged condominium property during his flight from the robbery). The borrowers easily meet that test.

THE COURT SHOULD NOT RELY ON JUDGE KOVACHEVICH'S ORDER UNTIL THE ELEVENTH CIRCUIT HAS HAD A CHANCE TO RULE ON THE VALIDITY OF THAT ORDER.

Miller finally contends that this Court should rely on the order of Judge Kovachevich in the related criminal case of Miller's co-conspirator, *United States v. Coon*, No. 8:08-CR-441. On November 21, 2008, however, the borrowers filed a notice of appeal in that action. On December 2, 2008, they intend to file a petition for review of that order in the Eleventh Circuit, as provided in the CVRA. *See* 18 U.S.C. § 3771(d)(3). The Eleventh Circuit will likely rule on that petition by December 16, 2008.[4] Therefore, until the Eleventh Circuit has had a chance to rule on the validity of the order, it would make sense for this Court to avoid reliance on it.

In any event, as the borrowers specifically explained in their earlier pleadings, it appears that Judge Kovachevich was misled about the financial consequences of Coon's crime in reaching her decision. *See* Motion to Have Additional Coast Borrowers Recognized, Statement of Fact at 9 (referring to financial documentation showing harm to victims). Miller responds that this claim is "completely baseless." But he chooses not to engage the borrowers on the merits of their arguments – or to provide any documentation or factual recitations responding to their position. For this reason as well, this Court should not rely on the order.

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[4] The CVRA requires action on a mandamus petition within 72 hours. *See* 18 U.S.C. § 3771(d)(3). However, the borrowers are planning to waive their right to such a decision for a period of time up to December 16, 2008.

CONCLUSION

For the foregoing reasons, Borrowers respectfully request that this Court enter an order pursuant to the Crime Victim's Rights Act finding that they are "victims" of Miller's offenses, along with the other similarly-situated borrowers, and that they are therefore entitled to exercise all of their rights under the CVRA, including their right to restitution.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing on this 25th day of November, 2008, with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to Rachelle DesVaux Bedke, Assistant United States Attorney, (rachelle.bedke@usdoj.gov);and Eduardo A. Suarez, Esq., (esuarez@suarezlawfirm.com) counsel for defendant, and a true and correct copy of the foregoing was furnished via regular U.S. mail to David Tremmel, Federal Probation Officer, Post Office Box 3905, Tampa, FL 33601.

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